

BORN CLASSIFIED, BORN FREE: AN ESSAY FOR HENRY SCHWARZSCHILD

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The Saturday after Kristallnacht in November 1938 was to be Henry Schwarzschild's Bar Mitzvah. Henry's family went ahead with this illegal ceremony in secret and then escaped Berlin for the United States. I first met Henry when I spent the summer of 1979 at the national office of the ACLU. As I will explain, there are many reasons to dedicate this Article about freedom of expression, exogenous challenges to law, and the obligation to search for justice to Henry Schwarzschild's prophetic presence and to his memory. Somehow the idea of peaceful rest does not seem apt for Henry's activist soul. May his life and his unique mix of skepticism and passionate engagement be remembered for a blessing.

"Seekers of truth and guardians of the right increase peace in the world."¹

PROLOGUE: TO BE NOT IGNORANT OF WHAT HAS BEEN SAID²

The huge headline leapt from the full-page advertisement in a September 1991 issue of the *New York Times*: "This year Kristallnacht took place on August 19th right here in Crown Heights."³ The ad labeled that summer's violence in Williamsburg a "po-

* Dean and Professor of Law, Boston College Law School. I would like to thank a Möbius strip of friends who shared in admiration of Henry and who were willing to read earlier drafts of this Article. They include: Milner Ball, Marlene Booth, Danny Greenberg, George Kannar, Carol Weisbrod, Steve Wizner, and Larry Yackle. I also benefitted enormously from research assistance by David Kurtz and, particularly, Christine Vanston, and from the editorial suggestions of my parents. I am most grateful to all these people and to the editors of the *Cardozo Law Review* for encouraging and sticking with this Article.

¹ Shalom Spiegel, *Amos vs. Amaziah*, in *THE JEWISH EXPRESSION* 38, 63 (Judah Goldin ed., 1976) (quoting the Talmud, *Berakhoth* 64a).

² At the end of 1859, Henry David Thoreau noted in his journal that "he who speaks with most authority on a given subject is not ignorant of what has been said by his predecessors." ROBERT D. RICHARDSON JR., *HENRY THOREAU: A LIFE OF THE MIND* 379 (1986). A few days later, Thoreau wrote: "A man receives only what he is ready to receive, whether physically or intellectually or morally. . . . We hear and apprehend only what we already half know. . . . Every man thus *tracks himself* through life, in all his hearing and reading and observation and traveling." *Id.* at 379-80.

³ N.Y. TIMES, Sept. 20, 1991, at A21.

grom" and sought tax-deductible contributions to the Crown Heights Emergency Fund to combat "neo-Nazism in its most virulent form."⁴

Since *New York Times v. Sullivan*,⁵ it has been clear that the expression in this and similar advertisements is constitutionally protected. Seldom, however, has such speech been met with words as carefully chosen, yet as robust, wide-open, and vehement as those contained in a letter by Henry Schwarzschild published by the *Times* a few weeks later. Under the headline "Invoking Kristallnacht Betrays Jewish History," Henry argued that "the characterization of the events following the automobile death of a black child in Brooklyn . . . as a Kristallnacht is a betrayal of Jewish history and ethics."⁶ Henry mentioned his direct experience with Kristallnacht "only to indicate that I have some credentials for knowing a Kristallnacht when I see one."⁷

Skilled polemicist that he was, Henry went on to decry black anti-Semitism and the demagogues who encourage it. Yet his letter even more caustically criticized Jewish community leaders for their failure to express sadness more promptly and publicly at the death of a seven-year-old "occasioned by the Lubavitcher rebbe's motorcade."⁸ It was those who abuse history "for transient political and financial gain"⁹ who constituted Henry's main target.

Henry's letter is a forceful reminder that we are all born into a web of traditions. Life consists of an ongoing series of negotiations with and about identities and traditions with which we all enter the world. As I will discuss below, Henry's vivid personal knowledge of the significance of being classified as Jewish in Germany in the 1930s undoubtedly had much to do with his many campaigns against state-sanctioned and judicially-imposed injustice. Humankind has shown a distressing tendency to make a person's belongings depend on her belonging. Countless beloveds have been torn away forcefully, even lethally, from those who long for them.¹⁰ Paradoxically, those who bear the tragic burdens of

⁴ *Id.*

⁵ 376 U.S. 254 (1964).

⁶ Henry Schwarzschild, *Invoking Kristallnacht Betrays Jewish History*, N.Y. TIMES, Oct. 5, 1991, at A20.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ I am not alluding solely to the Holocaust, unhappily, nor is the belonging/beloved dichotomy entirely free of moral complexity. See, e.g., TONI MORRISON, *BELOVED* (1987).

history most directly may also have a special responsibility to seek justice.

At the close of a century often gruesome and frequently downright horrific, the powerful urge to resist all government classifications of people is hardly surprising. We know that classifications can often be used to discriminate—and sometimes to aid and abet murder. The ahistorical ideal of a free individual, liberated from all classificatory schemes that others seek to impose, may be particularly appealing in an era when official abuse of human classifications has been so appalling.

Americans in particular seem to share a long-standing, widespread desire to float free of history. The aristocrat Alexis de Tocqueville commented on the phenomenon more than 150 years ago. Tocqueville explained:

[N]ot only does democracy make men forget their ancestors, but also clouds their view of their descendants and isolates them from their contemporaries. Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart.¹¹

To be sure, the deracination inherent in ahistoricism can be at least partially liberating. Yet it is a liberation that depends upon the mirage of a free marketplace of individual pasts and futures, purchased, in actuality, at a considerable price. Moreover, historical awareness is more apt to be crucial for the downtrodden. This is because history subverts the very idea that the status quo is somehow natural or inevitable. Its complexities correct for the notion that whatever exists today is the best that can be.

This Article first focuses on state-sanctioned classifications in the context of the First Amendment. Through the prism of official classificatory schemes, we can better understand the convolutions of the Pentagon Papers litigation. The problem of insiders and classified information also helps to explain why the *New York Times* precedent meant so little a few years later when the Government successfully enjoined publication of an article in *The Progressive* for over half a year.¹²

By discussing challenges to law mounted by members of disparate interpretive communities who stand at least partially outside the legal system, this Article also seeks to illuminate differences between absolutes and universal principles. It suggests why

¹¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 508 (J.P. Mayer ed., Doubleday Books 1969) (1966).

¹² See *infra* Part I.C.2.

we should always be at least somewhat skeptical of the mainstream tendencies of the judicial imprimatur—whether in determining who gets access to information or who is condemned to die—and keenly aware of the danger that any judicial decision may take on a life, or a death, of its own.

In our society, absolutism and true belief frequently are conflated, and condemned. Yet there is an elusive but important distinction between absolute beliefs and universal principles. A skeptic about absolutes may be the very person most committed to the ongoing quest for universal principles. Someone else may long for absolutes, yet refuse to wait while confronting current injustice.

A sense of the critical importance of context concentrates on justice *now*. The demanding immediacy of this approach differs both from abstract predictions of what will make a just world, and from inflexible principles of life, law, or experience. From a vantage point within the belly of the beast—for example, from the perspective of insiders within the federal government's classification system—as well as from the external perspective of a self-described professional outsider such as Henry Schwarzschild, this is a distinction that sometimes makes a crucial difference.

Henry Schwarzschild's life suggests the difficulty inherent in an active life of courageous integrity. His insistent moral witness caused trouble when he punctured idolatry of all kinds. For example, he frequently challenged all of us who make and uphold law. Henry did so more directly and with more consistency than most. His approach was quite different from the patterns we may be able to discern in the story of Daniel Ellsberg and the journalists who pushed with gutsiness and gusto to publish stories from the Pentagon Papers. Throughout his life, Henry sought to transcend unquestioning reverence for law along with other true belief systems. Yet it took deep skepticism, along with a strong sense of the tragic obligations of history, for Henry to avoid the pitfalls of solipsism. In other words, to reflect upon the example of Henry Schwarzschild's life is to dare to doubt—and to stretch even beyond the search for justice to the jagged quest for righteousness.

I. CLASSIFYING CLASSIFICATION SCHEMES

A. *Refreshing Recollection*

Like many a skilled lawyer before him, David Rudenstine manages to refresh recollection while also enhancing it. His meticulous study of the Pentagon Papers litigation and its context

admirably reminds us of a dramatic time replete with jagged, impassioned disputation. To Rudenstine's credit, he also presents much that went unexamined until his book. Another great strength of *The Day the Presses Stopped*¹³ is Rudenstine's considerable skill in describing and cogently criticizing tactical choices and legal maneuvers made by the lawyers and judges on all sides of the case.

Again and again, *The Day the Presses Stopped* illuminates a central irony of legal strategy in important high-profile cases: lawyers are compelled to classify a case quickly, but highly-charged cases have a way of changing rapidly and repeatedly, thereby insistently undercutting the legal pigeonholes into which any particular conflict has been jammed. Rudenstine effectively takes readers behind the scenes, and he successfully conveys the drama and flux of such a case.

To people who have not had the benefit of *The Day the Presses Stopped*, the Pentagon Papers litigation may seem a pure judicial rejection of an unprecedented effort by the federal government to impose a prior restraint on newspapers. After all, that the First Amendment protected primarily—or, at the least, fundamentally—against just such a prior restraint was almost a cliché by 1971. It would seem to follow, therefore, that the battle of the titans in this case fit into a familiar constitutional law category with rare exactitude: national security concerns clashed with basic freedom of the press claims. The judge's job seemed simply to be to apply the particular First Amendment theory he favored to declare who the winners and losers ought to be.

Seemingly, any judge would be aided by the fact that *Near v. Minnesota*,¹⁴ the clearest precedent, provided vivid, yet wonderfully malleable, hypotheticals. *Near* boldly declared strong judicial disapprobation of prior restraints, but Chief Justice Charles Evans Hughes's opinion for a five-to-four majority also suggested significant exceptions to the principle the case announced. Hughes suggested that a court unquestionably could and should halt a publication that was about to disclose the sailing dates of transports, the location of troops, and the like.¹⁵ *Near* thus seemed to clear away the underbrush, facilitating consideration of whether the government's effort to halt disclosure of the Pentagon Papers was analogous to the exceptions cryptically suggested in *Near*. In fact, Wil-

¹³ DAVID RUDENSTINE, *THE DAY THE PRESSES STOPPED* (1996).

¹⁴ 283 U.S. 697 (1931).

¹⁵ See *id.* at 716.

liam Rehnquist, then the Assistant Attorney General in charge of the Department of Justice's Office of Legal Counsel, relied primarily on *Near* when he advised Attorney General John Mitchell and Assistant Attorney General Robert Mardian that the Court would most likely uphold an injunction against publication.¹⁶

Categorization of the government action as a prior restraint in turn seemed to establish who had to meet what burden in court, and how weighty competing presumptions might prove to be. Indeed, the prior restraint label, in conjunction with the Government's disastrous presentation of its case in closed session, does much to explain how Judge Murray Gurfein, a Republican stalwart and former prosecutor who was newly appointed to the federal bench by President Nixon, could wind up refusing to enjoin publication by the *New York Times*. The label continued to stick in the Supreme Court.

B. *Absolutes v. Universals*

Though Justices Black and Douglas were the only absolutists who read the First Amendment to bar all prior restraints, Justice Brennan came close. Because Brennan discerned the First Amendment's primary purpose to be protection against prior restraints, he prescribed a legal standard that was, in effect, virtually unattainable by the government. The prior restraint label also pushed Justice Stewart to reject the Government's claims because he similarly believed that the Government was obliged to prove—and had failed to demonstrate—"direct, immediate, and irreparable damage to our Nation or its people."¹⁷ Justice White's recognition of "the concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system"¹⁸ also figured decisively in his analysis. Though Justice Marshall relied primarily on a separation of powers theory in voting against the Government, he also vigorously chided the Nixon Administration for attempting to dodge the normal pattern of congressional legislation and a subsequent criminal trial through its efforts to convince a lone judge to impose a prior restraint.¹⁹

Justice Black's passionate assertions about the absolute pro-

¹⁶ See RUDENSTINE, *supra* note 13, at 79-80.

¹⁷ *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

¹⁸ *Id.* at 730-31 (White, J., concurring). The three dissenters did not disagree that the case involved a prior restraint and that, accordingly, "prior restraints were disfavored in comparison to post-publication sanctions." RUDENSTINE, *supra* note 13, at 377-79 n.4.

¹⁹ See *New York Times Co.*, 403 U.S. at 745-46 (Marshall, J., concurring).

tection of the First Amendment—to him, clearly the only proper way to read the text of the Amendment—never commanded a majority of the Court. Ironically, Justice Black's own commitment to absolutism about freedom of expression drove him to a crabbed view of how to define protected expression.²⁰ In his last years, Black seemed to maintain the purity of his position by narrowing his classification of what counted as expression, thereby excluding case after case from the robust constitutional protection he continued to embrace.

Furthermore, it is easy to read too much into the assertion that "[f]or the first time since the very adoption of the Constitution the U.S. government was seeking a prior restraint with respect to the press."²¹ The point may be technically true—the averment partially depends on how a prior restraint is defined—but its *ad terrorem* implication significantly overstates the relative historical sanctity of the freedom of the press. The Civil War and World War I, for example, proved to be hard times for publications outspokenly critical of the war efforts, even for newspapers that gave offense in mild and indirect ways. Throughout most of our nation's history, government officials have been able to stop dissenting publications effectively without the need for injunctions.²² In *Dennis v. United*

²⁰ See, e.g., *Street v. New York*, 394 U.S. 576, 609-10 (1969) (Black, J., dissenting) (declining to join decision holding statute prohibiting public desecration and disparagement of American flag unconstitutional); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 515-26 (1969) (Black, J., dissenting) (disagreeing with decision upholding right of students to wear black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (joining decision upholding conviction for burning draft cards in violation of the Universal Military Training and Service Act of 1948); *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (holding that convictions of protesters for trespass did not abridge freedom of expression because "people who want to propagandize protests or views [do not] have the constitutional right to do so whenever and however and wherever they please").

²¹ RUDENSTINE, *supra* note 13, at 106; see also *id.* at 4.

²² The Alien and Sedition Acts of 1798, for example, spawned successful prosecutions of editors and quite effective suppression of expression. See generally JAMES M. SMITH, *FREEDOM'S FETTERS* (1956). For a description of Union military suppression of the press through direct suspension of publication during the Civil War, along with exclusion of offending papers from the mails and "the arbitrary arrest of offending editors," see J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 477-510, 502 (rev. ed. 1964). During World War I, there were well over 1000 federal prosecutions for disloyal utterances, oral and written, and many state prosecutions as well. It is well known that subsequent punishment for expression was upheld by the Supreme Court in *Schenck v. United States*, 249 U.S. 47 (1919), and subsequent cases involving newspapers and handbills as well as individual utterances. See generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1941). Perhaps less familiar was the denial of mail privileges to newspapers and magazines. While this practice, arguably a very effective prior restraint, was partially in Judge Learned Hand's famous district court opinion in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), the United States Court of Appeals for the Sec-

States, for example, which upheld the convictions of leaders of the Communist Party on the basis of the future harms that their words threatened to produce, Chief Justice Vinson firmly (if not absolutely) proclaimed that "[n]othing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature."²³

The Government witnesses in the Pentagon Papers case who sought to preserve the secrecy of the classification system embraced absolute values and a system functioning largely outside legal norms and legal procedures. Hard-nosed pragmatic experts within the national security establishment share considerable distrust of the normal rule of law with Henry Schwarzschild. For them, this translated into a kind of privileged legal shield. Indeed, it was a privilege sufficiently broad and strong that they did not feel entirely bound by normal legal rules. When Dennis James Doolin, the Deputy Assistant Secretary of Defense for International Security, testified in a closed session before Judge Gurfein, for example, the increasingly frustrated judge gave the former CIA senior analyst "one more chance" to specify potential harm that publication of the Pentagon Papers would entail. Doolin told the judge, "I could explain it, but I can't."²⁴

This "can't" announced by Doolin echoes the words of martyrs throughout history. But it is worth pondering what higher authority Doolin thought to serve—and noteworthy that his refusal to answer a judge's direct question in a closed court session was treated as unremarkable.

C. *The Gang That Couldn't File Suit Straight*

1. *The Imperatives of Categories*

In retrospect, the fact that the Pentagon Papers case came to be defined as a pure example of a prior restraint case made its legal resolution appear relatively easy.²⁵ It is revealing, however,

ond Circuit emphatically reversed, 246 F. 2d 494 (2d Cir. 1917), and postal authorities refused to process offending publications throughout the war.

²³ 341 U.S. 494, 508 (1951). Aided by this apparent precursor of postmodernist thought, Chief Justice Vinson determined quite firmly that "[s]peech is not an absolute, above and beyond control by the legislature." *Id.*

²⁴ RUDENSTINE, *supra* note 13, at 159.

²⁵ Yet in the years before the Pentagon Papers case arose, leading experts pointed out that there was no common understanding as to what constitutes a 'prior' restraint. Nor was there much common ground as to why First Amendment doctrine so disfavored a

that leading lawyers for the *New York Times* initially advised vehemently against publication. They categorized the case differently and perceived that it would turn on the fact that the Pentagon Papers had been classified as Top Secret. Indeed, venerable attorney Louis Loeb, who had been a legal adviser to the *Times* since 1929 and served as its general counsel for many years, argued vigorously that publication would expose the newspaper to prosecution under criminal espionage statutes and the executive order establishing the classification system.²⁶ It took careful legal work and skillful advocacy by James Goodale, the young new general counsel of the *Times*, to counter such advice and help persuade *Times* publisher Arthur Ochs Sulzberger to publish. Goodale also had to prevail over the forceful legal, political, and patriotic advice of Loeb's senior partner, Herbert Brownell. As Attorney General in the Eisenhower Administration, Brownell had drafted the Executive Order establishing the classification system that was still in place and at issue in 1971.²⁷

Rudenstine does a fine job explaining that the decision to publish was anything but a sure thing at either the *Times* or at the *Washington Post*. At the *Post*, in addition to immediate legal concerns, Katharine Graham also had to worry about the impact that boldness on behalf of freedom of the press might have on the *Post*'s pending broadcast license applications, to say nothing of the potential effect on the price of more than 1,000,000 shares of stock with which the *Post* had gone public merely two days earlier. Rudenstine also astutely emphasizes "how crucial to any legal case

prior restraint even if it were properly so labeled. See, e.g., sources cited in RUDENSTINE, *supra* note 13, at 377 n.4. For a more recent and particularly illuminating disagreement about the appropriate weight to be assigned prior restraints, compare Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 MINN. L. REV. 11 (1981), with John C. Jeffries, *Rethinking Prior Restraint*, 92 YALE L.J. 409 (1983). Tom Emerson, who wrote the classic analysis of prior restraint, see Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648 (1955), was my teacher, and I was privileged to be his teaching assistant for two years. I have a vivid memory of how excited this normally imperturbable man was about the Pentagon Papers case when I saw him in New York on his way to the hearing in Judge Gurfein's courtroom.

²⁶ See Espionage Act, ch. 30, Title I, §§ 1, 2, 40 Stat. 217, 218 (1917) (codified as amended at 18 U.S.C. §§ 793(e), 794(a) (1994)).

²⁷ A very readable and nearly-contemporaneous account of the litigation by Sanford Ungar reported that Goodale considered himself as much a newsman as a lawyer. Ungar quoted Goodale: "There's always a way to get [a story] into print, everything that comes to you." SANFORD J. UNGAR, *THE PAPERS & THE PAPERS* 98 (1972) (alteration in original). It helped Goodale that he had served in a strategic intelligence research group in the Army Reserve and correctly guessed that there had to be something in the Pentagon Papers taken directly from the *New York Times* and stamped "Top Secret." See *id.*

are the first set of moves."²⁸

In their first moves, made while working under enormous time pressure, the lawyers for the Government all but conceded the prior restraint label. Yet it was their effort to uphold the classification system that led them to make such a mishmash of deciding what testimony their witnesses would be allowed to give, and how secretive people should be in physically handling the allegedly secret documents that constituted the Pentagon Papers.²⁹ Another way the case might have been classified—indeed, the way it was perceived initially by some of the *Times*' own lawyers—was that most basically it implicated the integrity of the government classification system.

With the benefit of a temporal rearview mirror, one can see that once the decision had been made to seek to enjoin publication, some of the ferocity that drove President Richard Nixon and his inner circle to go after the *Times* and the *Post* involved personal vendettas—such as that of Henry Kissinger against his former student Daniel Ellsberg—and an almost paranoid general relationship with the press.³⁰ But Nixon also convinced himself that he was obliged as President to protect the classification system and classified documents, particularly when a newspaper such as the *Times* asserted that its journalistic obligations transcended national security concerns.³¹

It is hardly surprising, of course, that a person now generally recognized to have been as deeply secretive and arrogant as Nixon would talk explicitly about treason and would exhort his followers to rally to the barricades and to pursue secret illegal stratagems in the name of protecting the public's interest in secrecy. A basic point that tripped up his lawyers was that the rules of the classification system could be neither applied nor explained coherently. Under the classification system rules in effect at the time, for example, old articles from the *New York Times* and presidential addresses were correctly classified within the Pentagon Papers as Top Secret, along with all the historical information about secret diplomacy and military plans within the forty-seven volumes.

²⁸ RUDENSTINE, *supra* note 13, at 109.

²⁹ Sanford Ungar detailed a number of additional Justice Department errors and questionable tactical judgments, ranging from basic mistakes made in haste concerning venue and miscitation of the Espionage Act, to a strikingly irregular pattern of reaction to various newspapers around the country that published articles based on the secret materials. See UNGAR, *supra* note 27, at 124, 151, 164, 190.

³⁰ See RUDENSTINE, *supra* note 13, at 118-22.

³¹ See *id.* at 124.

Moreover, no one could explain clearly how decisions either to classify or to declassify were supposed to be made.

Judges Gurfein and Gesell were left to ponder a labyrinthine bureaucratic system that seemed to be careening out of control. As Justice Stewart forcefully put the point, "when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless, and to be manipulated by those intent on self-protection or self-promotion."³²

The norms of the national intelligence community³³ are hardly coherent, nor do its members appear to constitute much of a community. Moreover, in recent years there have been efforts to reform significantly the classification and declassification mechanisms of the federal government. For example, President Bill Clinton's sweeping Executive Order No. 12,958 proclaims that, in light of changed world conditions, there is now "greater opportunity to emphasize our commitment to open Government."³⁴ Recently, a bipartisan Commission on Protecting and Reducing Government Secrecy also decried the "culture of secrecy" spawned by the Cold War and proposed substantial reforms.³⁵

That there is indeed a culture of secrecy is a key point, and using law to change any culture is tricky at best. Within the culture of secrecy, there is a professional interest in finding things to keep secret. There is also tremendous self-interest in maintaining the discretion of insiders to determine whether a breach of secrecy has occurred, and when it is appropriate to punish that breach. Memoirs by former Presidents and other high officials that may disclose top secret information are likely to go unpunished, while whistle-blowers in various guises are likely to find themselves entangled in threats of the loss of their security clearances, or worse. In any culture, a crucial method by which insiders retain their status is by determining who may remain within and who is to be

³² *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971).

³³ For example, in Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 401 (1988), President Ronald Reagan proclaimed: "Maximum emphasis should be given to fostering analytical competition among appropriate elements of the Intelligence Community." This order reconstituted National Security Council procedures to enhance government secrecy, and thereby facilitated the Iran-Contra imbroglio.

³⁴ Exec. Order No. 12,958, 3 C.F.R. 333 (1995).

³⁵ S. REP. NO. 103-105-2 (1997). The Commission, convened by Senator Daniel Patrick Moynihan (D-N.Y.), called for a return to a system affording government secrecy a limited, albeit still significant, role. Following the Commission's recommendation, the Government Secrecy Act of 1997, *see* H.R. 1546, was introduced on May 7, 1997 by Representatives Larry Combest (R-Tex.) and Lee Hamilton (D-Ind.); its companion was introduced in the Senate by Senator Moynihan and by Senator Jesse Helms (R-N.C.).

an outsider in varying degree.³⁶ Whenever an exclusion is sanctioned by the state, it carries particular weight. When a security clearance has become necessary for a person's professional livelihood, however, government officials and recipients of government contracts have an unusually effective policing mechanism available to them: even the threat of a loss of clearance brandished against anyone who seems a risk can endanger an entire career.³⁷

2. *The Alleged H-Bomb Secret: The Limits of Legal Precedents and Prior Restraints*

From March through most of September, 1979, Federal District Judge Robert Warren barred *The Progressive* from publishing an article entitled, "The H-bomb Secret: How We Got It—Why We're Telling It."³⁸ For more than six months, the government successfully imposed a prior restraint against the article written by Howard Morland, a freelance journalist with no science background beyond a few college courses. Ultimately, because the information contained in the article began to appear in various venues and seemingly had been derived from a wide range of sources, the case was mooted and the Government dropped its injunction

³⁶ See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (George Simpson trans., 1966) (1930); KAI T. ERICKSON, *THE WAYWARD PURITANS* 5 (1966).

³⁷ The phenomenon is widespread and effective, though it goes largely unreported. I have seen it work myself. It takes considerable courage to defy the system. For example, two scientists who were actively involved in the *Progressive* case, see discussion *infra* Part I.C.2, recently ran afoul of the classification system. Alexander DeVolpi, a nonproliferation specialist at Argonne National Laboratory, was temporarily stripped of his top level security clearance after he published articles that purportedly revealed classified information. Similarly, Hugh DeWitt, an astrophysicist at Lawrence Livermore National Laboratory, was slapped with a security infraction after uttering classified words to a Department of Energy Commission charged with reforming classification policies. While their clearances have been restored, both men speculated that the DOE imposed the sanctions in order to harass and to intimidate them. See Steve Usdin, *Argonne Scientist's Security Clearance Restored*, NEW TECH. WK., Sept. 23, 1996, at 1; Al Kamen, *The Campaign Road More Traveled*, WASH. POST, June 10, 1996, at A17; Steve Usdin, *Critical Scientist Loses Clearance, Charges DOE with Retaliation*, NEW TECH. WK., Apr. 22, 1996, at 1.

³⁸ See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979). The Supreme Court denied leave to file a petition for mandamus, though Justice White wrote a dissent, joined by Justice Brennan. I should disclose that I spent most of the summer of 1979 working in the national office of the ACLU on various aspects of the *Progressive* case. This is hardly the place to give my perspectives on that fascinating time, and there are other significant firsthand accounts available. See, e.g., ALEXANDER DEVOLPI ET AL., *BORN SECRET: THE H-BOMB, THE PROGRESSIVE CASE, AND NATIONAL SECURITY* (1981); HOWARD MORLAND, *THE SECRET THAT EXPLODED* (1981); Erwin Knoll, *The H-Bomb and the First Amendment*, 3 WM. & MARY BILL RTS. J. 705 (1994). See also ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 39-54 (1990).

suit before the United States Court of Appeals for the Seventh Circuit could hand down its decision on appeal.

Of course, the Supreme Court's decision allowing publication in the Pentagon Papers case only eight years earlier was the leading precedent. But those involved in the *Progressive* case also had to grapple with massive fears triggered by allegations that Morland's article might actually reveal aspects of the H-bomb secret. The very idea of helping other nations build the H-bomb made it seem to many that government secrecy ought to take precedence over freedom of the press precedents. As a legal matter, the *Progressive* case also arguably was properly set apart because it directly implicated the Atomic Energy Act of 1946.³⁹ In particular, the Government claimed that Morland's article was secret under an interpretation of the Act that claimed that many ideas pertaining to nuclear matters became government secrets immediately upon coming into existence.⁴⁰

To be sure, the very notion that any information can be "born classified" is surrounded by, and perhaps bogged down in, epistemological quicksand. Under this rule, for example, the instantaneous classification of nascent knowledge meant that the underlinings in Howard Morland's dog-eared college physics textbook were deemed Top Secret, and Edward Teller's article on the hydrogen bomb in the popular *Encyclopedia Americana* also purportedly contained classified information. Day after day, catch-22 situations arose in which lawyers working on the case who had been given security clearance could not tell other lawyers working with them who lacked the requisite clearance that what the lawyers or their clients were saying was classified and/or violated the injunction. Indeed, during the course of the litigation, four courageous physicists at the Argonne National Laboratory, under contract with the Department of Energy, wrote a letter to Senator John Glenn (D-Ohio), then the Chairperson of the Senate Subcommittee on Energy, Nuclear Proliferation and Federal Services, asserting that affidavits released by the Government in support of its efforts to prevent disclosure actually had disclosed precisely

³⁹ Atomic Energy Act, ch. 724, §§ 1-21, 60 Stat. 755 (codified as amended at 42 U.S.C. §§ 2011-2296 (1994)).

⁴⁰ Under § 2162, information pertaining to nuclear energy and nuclear weapons becomes Restricted Data without any action by any government agency. It is thus "born classified." For a clear treatment of this and related issues in the context of the *Progressive* case, see Mary M. Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163 (1980).

what the Government was struggling to keep secret.⁴¹

There is an Orwellian quality to the concept that, without proper clearance, one may not have access to one's own ideas or work product. Moreover, these ideas are classified in the very act of becoming, without any procedures whatsoever. The Alice-in-Wonderland aspects of the power of naming inherent in the "born classified" doctrine helped to make the *Progressive* case a minor *cause célèbre*, as did the appearance of the alleged secret in diverse publications all around the country, without any link to the parties involved in the case itself.

If the case imparts a single important lesson, it is that freedom of expression guarantees are always vulnerable: even after the famous Pentagon Papers victory for the press, the Carter Administration easily invoked the arcana of the classification system to frighten a federal judge into imposing a prior restraint for over half a year to cloak a secret that was dubious at best.

Yet surely it is easy to empathize with District Judge Warren's fear of nuclear proliferation—though perhaps not with his apparent application of an updated version of the World War I-era "bad tendency" test as the legal standard in the case. As in the Pentagon Papers case, sophisticated insiders in the *Progressive* litigation sought to convince a judge with no background in an area rife with esoteric knowledge that special knowledge was required to comprehend the extent to which what was about to be disclosed would irreparably injure the national interest. Early in the case, Judge Warren sounded like an American Everyman when he proclaimed, "I'd like . . . to think a long hard time before I gave the hydrogen bomb to Idi Amin."⁴² Much of the press initially reacted similarly. Even the *Washington Post* editorialized that this was "John Mitchell's dream case—the one the Nixon administration was never lucky enough to get: a real First Amendment loser."⁴³

⁴¹ The letter, dated April 25, 1979, was signed by the four authors of *Born Secret*. See DEVOLPI ET AL., *supra* note 38. It was initially ignored and then turned over to the Department of Energy, which promptly classified the letter. The letter is included as Appendix B to the informative recounting of the case in their book.

⁴² *Id.* at 61 (quoting comment made during the initial hearing before Judge Warren granted a temporary restraining order). Later, in granting and then sustaining a preliminary injunction, Judge Warren emphasized that the *Progressive* case differed from the Pentagon Papers case in two vital respects: 1) there was a statute, the Atomic Energy Act, that seemed to him to cover the situation; and 2) the threatened harm was so grave that the publication was akin to disclosing the location of troop ships or some of the other very narrow exceptions to the heavy presumption against prior restraints. Judge Warren summarized his point by noting, "You can't speak freely when you're dead." *Id.*

⁴³ *John Mitchell's Dream Case*, WASH. POST, Mar. 11, 1979, at C6. To be sure, the

Though insiders disagreed, and some brave experts were willing to support publication, those most directly associated with the national security establishment sought to scare Judge Warren away from permitting publication.

I have discussed the *Progressive* case briefly in part to counter the widespread urge to be sanguine about freedom of the press after *New York Times Co. v. United States*.⁴⁴ More awareness of the *Progressive* case may reduce the tendency to attribute suppression of freedom of expression to wartime pressures or to the likes of President Nixon and his cronies. The nation was at peace when the liberal Carter Administration sought and won an injunction that restrained Morland's article. The strange entanglements of the *Progressive* litigation illustrate the inherent difficulties lawyers and judges encounter when they confront the unfamiliar. This is especially so when the unknown is defined and defended by an insistently esoteric interpretive community.⁴⁵ In other words, those whose specialized inside knowledge is law have great difficulty penetrating and evaluating the special knowledge that creates the community of national security insiders.

Declaring that enormous stakes were at issue, the national security experts who defined the case found it relatively easy to convince the judiciary that the heady mix of classified nuclear information made the *Progressive* case crucially different from the

willingness of various newspapers around the country to publish information from other sources that was said to contain the same secret as the Morland article led directly to the unraveling of the Government's case. Moreover, Dimitri Rotow, a college dropout who volunteered to work for the ACLU, discovered a document, UCRL-4725, on the open public shelves in the library at Los Alamos. This document, which apparently was mistakenly declassified, had been available to the public for more than a year. Another, apparently related document, UCRL-5280, also contained the results of weapons calculations and tests and similarly had been mistakenly declassified and available to the public for over a year on the open shelves. The Department of Energy stipulated that the essence of the H-bomb secret in the Morland article would be apparent to any "competent scientist" who read UCRL-5280. The physicists who wrote *Born Secret* use this stipulation and similar examples to bolster their ironic but substantial claim that, "[i]n pursuing the *Progressive* case, the government confirmed the basic ideas in Howard Morland's article, and incidentally released further nondeducible information about a component of the American nuclear arsenal—with indeterminate harm to national security." DEVOLPI ET AL., *supra* note 38, at 179. With careful marshaling of the evidence, these scientists argued that the Morland article should simply have been ignored.

⁴⁴ 403 U.S. 713 (1971).

⁴⁵ The importance of interpretive communities has recently been a big topic in academia. The concept may have had its first important articulation over a century ago, however, in the writing of the eccentric American philosopher Charles Sanders Peirce. See R. JACKSON WILSON, *IN QUEST OF COMMUNITY: SOCIAL PHILOSOPHY IN THE UNITED STATES, 1860-1920*, at 48 (1968).

classified historical and diplomatic information at stake in the Pentagon Papers litigation.⁴⁶ They were accustomed to a system whose rules allowed them to classify as Top Secret whatever they chose without regular procedures or any external review. The Born Classified rationale could apply from the moment of the germination of these ideas and could even be applied retroactively. In fact, the *Progressive* litigation exemplified this point. The decision by Government officials to label a publication as a national security risk moved the dispute outside the usual legal rules and beyond the ken of regular judicial processes.

Because "[t]he function of the censor is to censor,"⁴⁷ the judicial system is particularly strained when judges are thrust into reviewing the decisions of insiders about the gravity and directness of threatened harm, its irreparable quality, and its relative immediacy. Modern information technology may make it impossible to sustain a prior restraint today. Moreover, the history of prior restraints seems rife with administrative overreaction. Yet it is important to notice that the *Times*, the *Post*, and even *The Progressive* were not deterred by their obvious exposure to potential criminal sanctions, but that all these publications scrupulously sought to obey judicial injunctions. This strongly suggests that judicially-imposed prior restraints do indeed make a substantial practical difference.⁴⁸

⁴⁶ In fact, the Government went beyond its reliance on the far-reaching born classified doctrine. On appeal, Government attorneys argued that "technical information" concerning—but apparently not limited to—nuclear matters is not covered by the First Amendment at all. Like obscenity, therefore, such unprotected speech can be limited without undergoing even a minimal balancing test. See Brief for Appellee, *United States v. Progressive, Inc.*, 610 F.2d 819 (7th Cir. 1979). For a vigorous critique of the entire rationale of national security, including, but hardly restricted to, such doctrinal points, see Erwin Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981). In Knoll's essay, which was part of a 50-year retrospective on the *Near* decision, the late editor of *The Progressive* did a characteristically feisty job of explaining some of the ironic, if not absurdist, practical consequences for lawyers and clients of litigating while under an injunction severely restricting their ability to communicate with each other, with the outside world, and even with the judge. In an article written shortly before his death in 1994, Knoll announced his regret that he had not defied the Court's injunction. See Knoll, *supra* note 38, at 713. On the other hand, in *The Secret That Exploded*, *supra* note 38, Howard Morland catalogued his differences with Knoll and argued that Knoll had decided that a confrontation with the Government was preferable to immediate publication. Scot Powe went even further when he observed that "the injunction consummated a successful courtship initiated by the delivery of a copy of Morland's article and diagrams to the Department of Energy ("DOE"), builder of the nation's nuclear arsenal." L.A. Powe, Jr., *The H-Bomb Injunction*, 61 U. COLO. L. REV. 55, 56 (1990).

⁴⁷ Emerson, *supra* note 25, at 659.

⁴⁸ For a snappy elaboration of related themes, see Powe, *supra* note 46, at 63-66. It is quite remarkable, in fact, how deferential to the legal system American radicals often

In contrast to those who find comfort and even delight in paradox, the intelligence community repeatedly stressed the need for absolute secrecy and for exclusive expertise. The absolutism of the classification scheme and the best-and-brightest role these experts played became the source of their deep sense of being unfettered by ordinary legal procedures. Indeed, the very concept of born classified insisted on the ability of those in the know to separate a new idea and its material manifestation from its human originator. A strange irony linking the Pentagon Papers and the *Progressive* cases was that the insiders, by pinpointing what purportedly were vital national secrets, actually flagged the importance of what they sought to squelch for outsiders who otherwise might have paid little or no attention.

If the fault lines between legal and extralegal norms are broad and deep, only rarely are they so clearly revealed. When, for example, Dennis Doolin told Judge Gurfein in closed session, "I could explain it, but I can't,"⁴⁹ Doolin's answer was directly anchored in a competing community norm that easily seemed to outweigh normal—and perhaps even exceptional—legal processes. This kind of challenge to the law's supremacy from outside the legal order may not have emerged completely triumphant from the Pentagon Papers litigation. Yet when the contest turned from revelations of past history to purportedly very serious future threats, it became virtually impossible to defend in court against a top secret national security claim.

Insiders within the convoluted security classification system are understandably inclined to invoke their special knowledge of national security matters. The mind-twisting ramifications of the born classified doctrine suggest how bizarrely sweeping (and attractive) the power to impose on others via one's own expertise can be. It is hardly surprising that such special knowledge cannot be readily contained or controlled by judicial generalists in the course of traditional judicial procedures. In this sense, at least, the excessive secrecy within the *Progressive* case is likely to be a more prescient precedent than the Pentagon Papers.

prove to be. Perhaps the most telling historical example can be found in the decision by one of the anarchists accused in the Haymarket Bombing in Chicago in 1886 to turn himself in though he was safely in hiding. There were numerous procedural irregularities in the ensuing trial of Spies, but he was hanged despite great doubts about his actual guilt. See generally PAUL AVRICH, *THE HAYMARKET TRAGEDY* (1986).

⁴⁹ See *supra* text accompanying note 24.

II. A PROPHETIC CHALLENGE

Henry Schwarzschild was not much concerned with his own place in history, though he was neither a shrinking violet nor someone who lacked a healthy ego. Henry's scathing skepticism often focused on how sobering history actually turns out to be. On the other hand, he viewed historical accuracy as a necessary platform from which to launch the search for justice.

In fewer than nine pages, Milner Ball provides a beautifully written, remarkably accurate portrait of Henry and his moral landscape.⁵⁰ In Henry's world, one had to challenge unjust laws, either as written or applied, and to defy those who insisted on absolute obedience. "Whatever the cost," Henry explained, "I would not live in a period of major moral, social events and be a bystander . . . I took on the role of witness."⁵¹ The Germans of his youth had been bystanders. Henry refused to be that kind of German.

Though he participated directly in many groups and movements, Henry could not escape his own intuitive reservations about passionate social aggregations. He traced his suspicions to his first-grade experience in a suburb of Berlin when his teacher came to school in a Brown Shirt uniform. Yet Henry loved to address groups and to challenge them to act differently—and more radically—to hasten a more just world.

Henry once wrote that being classified as Jewish did not confer "standing or claim to preferment or even to protection (from the Holocaust, or by a nation-state, or whatever else)."⁵² Rather, being Jewish meant particular responsibility to bear witness actively, to seek justice even for unpleasant people who have done horrible things. Jews were not born free, but obligated. Though not religious in any traditional sense, Henry added, "We do not serve the master in expectation of a reward, but because it says *thou shalt*."⁵³

Only Henry Schwarzschild's death in June 1996 could disengage this lifelong activist from launching his direct challenges to some of the most pressing denials of justice of our times. Apparently, there are no pictures of Henry's experience in Mississippi

⁵⁰ See MILNER S. BALL, *THE WORD AND THE LAW* 7-16 (1993).

⁵¹ *Id.* at 9-10. Marie Failingler made the point that "what intrigues us about Atticus Finch [in *To Kill a Mockingbird*] is precisely what intrigues us about Henry Schwarzschild in Milner Ball's book." Marie Failingler, *Gentleman as Hero: Atticus Finch and the Lonely Path*, 10 J.L. & RELIGION 303, 304 (1994).

⁵² Letter from Henry Schwarzschild to Aviam Soifer (Aug. 16, 1995) (on file with author).

⁵³ *Id.*

jails as a Freedom Rider in 1961, but he can be seen standing alongside Martin Luther King, Jr. in photographs throughout the early 1960s. Henry, who proudly identified himself as "a specialist in losing causes,"⁵⁴ then worked as Coordinator of the Lawyers Constitutional Defense Committee, a messy but valiant effort by volunteer lawyers to support the Freedom Summer movement and its consequences in the mid-1960s. He went on to antiwar activism and the campaign for amnesty for Vietnam War resisters in the early 1970s. For the last fifteen years of his life, Henry played a leading role in the national campaign against the death penalty, first as Director of the ACLU's Capital Punishment Project and then as head of the New York office of the National Coalition to Abolish the Death Penalty. He also served on the National Advisory Committee of the American-Arab Antidiscrimination Committee and the boards of various civil liberties organizations. Tellingly, "he could be counted on to turn up anytime the Movement needed help."⁵⁵

Henry also could be counted on to challenge cant wherever he saw it, no matter who or what its source. He questioned with acerbic wit and a love for verbal combat. To Henry, freedom of expression was a universal goal. He scolded a friend who had been thinking about the possible acceptability of limited restrictions on hate speech. Henry explained, "I am a devout believer in civility, even in manners, except of course where manners interfere with pressing moral requirements."⁵⁶

For all his interest in legal values and his tenacious defense of constitutional principles, Henry Schwarzschild was a nonlawyer who liked to explain to lawyers and law students that he felt

⁵⁴ Cf. Letter from Rade Dj. Mikijelj to Henry Schwarzschild (July 10, 1991) (quoting Henry's statement back to him in response to Henry's inquiries about the political conditions in Yugoslavia) (on file with author).

⁵⁵ FRED POWLEDGE, *FREE AT LAST?* 645 (1991), *quoted in* Eric Pace, *Henry Schwarzschild, 70, Opponent of Death Penalty*, N.Y. TIMES, June 4, 1996, at B8.

⁵⁶ Letter from Henry Schwarzschild to Milner Ball (May 30, 1991) (on file with author). Henry's brother, Steven Schwarzschild, reported, "As my brother and I always put it to each other: we know that the world is about to perish, but one must dress for dinner anyway." *THE PURSUIT OF THE IDEAL: JEWISH WRITINGS OF STEVEN SCHWARZSCHILD* 255 (Menachem Kellner ed., 1990). Steven also explained that "[t]he only cases where I feel I must initiate speech and action are cases of immediate human, moral, and social, need—not, again, really in the expectation that I can improve things but simply because this is what it means to me to be 'a mensch.'" *Id.*

Henry was fascinated by the moral implications of the actions of John Brown, for example. Henry did not go as far as did Thoreau in defending John Brown's ill-fated 1859 attack on slavery at Harpers Ferry, but neither did he simply condemn the attack because of the resort to deadly force by Brown and his followers.

obliged to act in part because of his profound doubts about law. Indeed, he could not seem to resist the call to challenge and to explain.⁵⁷ To Henry, "No important social matter is a legal issue, including important questions about law."⁵⁸ Thus one is obligated to work against the death penalty and would be so whether or not there ever had been an Eighth Amendment.

Unlike many who oppose the death penalty, Henry did not try to camouflage the fact that the people for whose cause he fought were generally bad people who had done horrible things to others. The obligation to oppose the death penalty persistently and by virtually any means arises, said Henry, because the state sanction—including judicial action—makes capital punishment "far more ominous than the depressing but merely tragic acts of murder that the human race has experienced since Cain."⁵⁹ Sardonicly, Henry believed it appropriate that Oklahoma officials rushed a death row inmate to the hospital when he attempted suicide the evening of his scheduled execution. The inmate had his stomach pumped and was resuscitated—so that he could be executed only two hours later than planned. "[Q]uite right," Henry asserted, "the issue is not dying but getting executed."⁶⁰

At a 1990 Jerusalem conference about "Justice in Punishment," Henry Schwarzschild felt obliged to point out the rough numerical equivalency between the number of people executed by means of what he called "American state homicide" after the Supreme Court allowed the death penalty to be reinstated in 1976, and the number of Palestinians killed during the intifada under what he termed "a[n Israeli] governmental policy that explicitly sanctions brutality and sanctions these killings—summarily, crassly

⁵⁷ For almost a decade, for example, he traveled each winter to the woods of New Hampshire (which he loathed) in order to tell public interest lawyers and law students at the Robert Cover Memorial Public Interest Conference about how one could keep fighting for losing causes—even when the losses meant someone on your side died. In his last years, Henry worked fitfully on a collective biography of four Africans who were intellectually or artistically significant in 18th century Europe. Henry studied documents about these little-known men in libraries throughout Europe and the United States, but his own impossibly high intellectual standards along with the courage of the convictions that kept calling him somewhere to engage against imminent injustices—followed by his health crises—kept Henry from getting far into what could have been a pathbreaking study.

⁵⁸ BALL, *supra* note 50, at 12.

⁵⁹ Henry Schwarzschild, *Reflections on Capital Punishment*, 25 ISRAEL L. REV. 505, 510 (1991).

⁶⁰ E-mail from Henry Schwarzschild to Aviam Soifer (Aug. 11, 1995) (commenting on execution of Robert Brecheen) (on file with author); see also Serge F. Kovalski, *Inmate Survives Overdose, Is Sent Back for Execution*, WASH. POST, Aug. 12, 1995, at A3.

in terrorem.”⁶¹ Henry went on to assert that any state that seeks to solve social problems by killing human beings is, to that extent, profoundly uncivilized. State executions are worse than murder, Henry argued, because they “desacralize human life,” and because there is no acceptable answer to the question, “Why do we kill people who kill people in order to teach that killing people is wrong?”⁶² Needless to say, not all Henry’s hosts greeted his statement with glee. But Henry believed he had to bear witness, to be recorded “in horror and opposition also to these killings.”⁶³

Characteristically, Henry pushed ahead in an effort to root his moral point in the practical world. Unlike the intelligence classification insiders, he had no wish to create, nor any compulsion to defend, architectonic constructs. Rather, Henry had an intense long-term lover’s quarrel with law.

He even went so far as to suggest that an American citizen called for jury duty is morally bound to commit perjury when asked about her or his scruples about the death penalty. If one lies and is seated on the jury, Henry continued, the unanimity requirement makes it possible for that person single-handedly to prevent the death penalty. Then, asked this sardonic European intellectual, his brown eyes flashing under arched, bushy black eyebrows, “Is it morally tolerable to have the defendant, on his way to the electric chair, turn to you to say: You could have saved my life, and you refused, but at least you did not perjure yourself in the *voir dire* before trial?”⁶⁴ Henry answered his own challenge by pointing out that abolition of the death penalty would eliminate such dilemmas while it would also “significantly ennoble the polity.”⁶⁵

Like Dennis Doolin, who said he couldn’t answer Judge Gurfain’s direct question even in a closed courtroom, and like a num-

⁶¹ Schwarzschild, *supra* note 59, at 506.

⁶² *Id.* at 510.

⁶³ *Id.* at 506.

⁶⁴ *Id.* at 511. I was not with Henry at this conference, though I was on sabbatical in Israel and saw him there. Henry had entered Israel by crossing the Allenby Bridge after flying into Amman, because he wanted to see some of his colleagues working on peace and human rights on the Arab side of the Jordan. I heard Henry challenge and sometimes outrage numerous groups of law students and lawyers with this and similar moral quandaries, so I think I have a good sense of how enlivened Henry was and how he looked at such a moment.

⁶⁵ *Id.* Actually, Henry expressed some doubt about how to answer his own question. Because he firmly believed that death is “morally radically different” from any other criminal sanction, however, Henry called for an extra measure of intellectual searching in response to his stark hypothetical, even as he proclaimed with certainty that “we must free ourselves of states that kill.” *Id.*

ber of insiders who tried many techniques to shield the bafflingly complex classification system from any outside inquiry in the course of the *Progressive* case, Henry underscored the issue of when and why obedience to some other, perhaps higher, claims could justify ignoring—perhaps even defying—the norms of the legal system. Such occasions may be rare, but attention must be paid. One would have to be blind to past evils and indifferent to present injustices to believe that the rule of law was or should be an end in itself. Life is too tragic and human evil too real for that kind of leap of faith.

It might seem paradoxical that Henry was painfully aware of how the absence of a predictable and minimally fair legal regime is itself greatly to be feared. In pursuit of universal justice, Henry knew how to transform unrelenting skepticism into creative tension. Paradox begot commitment. Henry explained his work as coordinator of efforts by volunteer Northern lawyers to support civil rights activists in the South in the mid-1960s, for example, as necessary because the alternative was leaving people unrepresented, locked up in little county jails and subject to being clobbered or killed.⁶⁶ It was important that the LCDC lawyers helped keep activists out of jail, largely by removing their cases to federal court. But it was later crucial that Northern whites and Jews who helped the civil rights movement not fall prey to the sin of pride. Instead, Henry reminded, "We, and the country, learned in awe at the feet of black leaders and simple black people what a commitment to freedom and justice really means."⁶⁷

Like other committed seekers, Henry pursued the universal through the particular. He fiercely favored the free exchange of ideas, yet he knew that ideas could not truly be free. As Justice Holmes put it, "The past gives us our vocabulary and fixes the limits of our imagination: we cannot get away from it."⁶⁸ And Henry was quite old-fashioned in his close attention to individual quirks and to the mixed motivations and strivings of friends as well

⁶⁶ See Thomas M. Hilbink, *Filling the Void: The Lawyers Constitutional Defense Committee and the 1964 Freedom Summer* 96 (unpublished manuscript) (on file with author). Henry's language in this important oral history interview was considerably saltier than this paraphrase. He also made the important point that "[f]ortunately . . . nobody thought in those days of malpractice insurance. That would have killed it right there." *Id.* at 38.

⁶⁷ Henry Schwarzschild, *Al Chet: For the Sin of Pride*, 3 SH'MA, Oct. 5, 1973, at 137, 138.

⁶⁸ Oliver Wendell Holmes, *Learning and Science*, in COLLECTED LEGAL PAPERS 139 (1952).

as foes.

For all his seemingly Old World traits, there was an anomalous, emphatically American strand in what propelled Henry into the uphill battles he loved to fight. Freedom, for example, did not mean rejecting what one was born with or sloughing off the classification barnacles accumulated throughout life. Yet Henry delighted in the raucous freedoms in which many Americans indulge. Like Henry David Thoreau, with whom he shared an acquired name but most definitely not an abiding love of the outdoors, Henry Schwarzschild undertook a knowledgeable quest for self-emancipation. Yet for both men, self-emancipation could not be achieved at the expense of ignoring the freedom of others.⁶⁹

Henry Schwarzschild was an extraordinary man of our times, but he was also somewhat akin to the ancient prophets, because he was "preoccupied with man, with the concrete actualities of history rather than with the timeless issues of thought."⁷⁰ The great Rabbi Abraham Heschel, later to join the civil rights struggle himself, celebrated the Hebrew prophets for their active commitment to interference, to an "outgoing, transitive, inclusive" sense of justice that probed beneath forms and repeatedly denied ultimate laws and eternal ideas.⁷¹

Henry, too, seemed to know more about "the secret obscenity of sheer unfairness, about the unnoticed malignancy of established patterns of indifference, than men whose knowledge depends solely on intelligence and learning."⁷² As Shalom Spiegel put it, "Unlike the philosopher, the prophet can never rest at ease until the interval between contemplation and action is breached."⁷³ And Henry had a very good ear for "the silent sigh."⁷⁴

Abraham Heschel and Henry Schwarzschild actually knew each other. In 1966, Heschel sought advice about whether he should join the board of a new Poverty Rights Action Center, founded by George Wiley. Henry weighed the issues, mentioned some of the internecine battles and the fundraising challenges in-

⁶⁹ See RICHARDSON, *supra* note 2, at 316. In his "Slavery in Massachusetts" speech on July 4, 1854, Thoreau proclaimed: "I wish my countrymen to consider, that whatever the human law may be, neither an individual nor a nation can ever commit the least act of injustice against the obscurest individual, without having to pay the penalty for it." *Id.* at 315.

⁷⁰ ABRAHAM J. HESCHEL, *THE PROPHETS* 5 (rev. ed. Harper & Row 1969) (1936). Heschel first published the book in Crakow and Berlin.

⁷¹ *Id.* at 205, 210.

⁷² *Id.* at 9.

⁷³ Spiegel, *supra* note 1, at 60.

⁷⁴ HESCHEL, *supra* note 70, at 9.

volved, and noted that the group was very poor and that—in seeking societal change such as a guaranteed annual income—they had taken on a very tough task. Despite doubts about whether the group could survive, Henry advised Heschel to join the board. Heschel wrote back to thank Henry and to say he was following his advice.⁷⁵ Henry had written to Heschel, “George Wiley is a very able and good man [H]e is a man willing to take chances.”⁷⁶ So was Henry.

The questions Henry Schwarzschild insistently asked and the activist life he so persistently led underscore how “in and through the personal rediscovery of the great, we find that we need not be the passive victims of what we deterministically call ‘circumstances’ [B]y linking ourselves . . . with the great we can become freer—freer to be ourselves, to be what we most want and value.”⁷⁷ I often disagreed with Henry, and I loved to argue with him. Yet Henry Schwarzschild greatly helped me and countless others in the struggle to be free.

⁷⁵ See Letter from Abraham Heschel to Henry Schwarzschild (Nov. 14, 1966) (on file with author).

⁷⁶ Letter from Henry Schwarzschild to Abraham Heschel (Nov. 7, 1966) (on file with author).

⁷⁷ W.J. Bate, *The Burden of the Past and the English Poet* (1971), quoted in RICHARDSON, *supra* note 2, frontispiece.